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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988
No. _____

RONALD PAGEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

October 14, 1988
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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court's holding in Griffin v. Wisconsin create a new exception to the warrant requirement in automobile search cases whereby a parolee's automobile, in lawful control of a third party, may be thoroughly searched on less than probable cause and the fruits of that search may thereafter be used to convict the third party of a criminal offense?

2. Should a defendant's at trial identification as the driver of a vehicle searched be suppressed as the fruit of an unlawful arrest if it was solely the unlawful arrest that made defendant's identification possible?

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RONALD PAGEL,

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Respondent.

PETITION FOR A WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Ronald Pagel, respectfully prays that a writ of certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered on August 16, 1988.

LIST OF PARTIES

The above caption contains the names of all parties to this case.

REPORTS OF OPINIONS

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in the official reports as United States v. Pagel, 854 F.2d 267 (1988). The opinion of the trial court has not been published.

JURISDICTIONAL STATEMENT

The final decision of the United States Court of Appeals for the Seventh Circuit was entered on August 16, 1988. This Petition for Writ of Certiorari was filed within sixty (60) days of that date pursuant to Rule 28.2. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND ADMINISTRATIVE PROVISIONS

A. The Fourth Amendment of the United States Constitution.

> The right of the people to be secure in their person's houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue but upon probable cause supported by Oath or Affirmation, and particularly describing things to be searched, and a persons or things to be seized.

B. Wisconsin Administrative Code HHS § 328.21(c) reads in pertinent part as follows:

> **Search and Seizure. (1) General Policy.** A search of a client or the client's living quarters or property may be made at any time, but only in accordance with this section.
>
> (3) SEARCH OF LIVING QUARTERS OR PROPERTY.
>
> (a) A search of a client's living quarters or property may be conducted by field staff if

there are reasonable grounds to believe that the quarters or property contain contraband. Approval of the supervisor shall be obtained unless exigent circumstances, such as suspicion the parolee will destroy contraband or use a weapon, require search without approval.

(6) CONTRABAND. In deciding whether there are reasonable grounds to believe that a client possesses contraband or that a client's living quarters or property contain contraband, a staff member shall consider:

(a) The observations of staff members;

(b) Information provided by informants;

(c) The reliability of the information relied on. In evaluating reliability, attention shall be given to whether the information is detailed and consistent and whether it is corroborated;

(d) The reliability of the informant. In evaluating reliability, attention shall be given to whether the informant has supplied reliable information in the past and whether the informant has reason to supply inaccurate information;

(e) The activity of the client that relates to whether

the client might possess contraband;

(f) Information provided by the client that is relevant to whether the client possesses contraband;

(g) The experience of a staff member with that client or in a similar circumstance;

(h) Prior seizures of contraband from the client; and

(i) The need to verify compliance with rules of supervision and state and federal law.

STATEMENT OF THE CASE

On April 14, 1987, petitioner, Ronald Pagel, was lawfully operating a 1973 Oldsmobile on a state highway near Verona, Wisconsin with the permission of Wade Larsen, the titled owner of the vehicle, who was on parole. As he proceeded down the highway, petitioner observed all traffic regulations and did nothing to give rise to any suspicion or probable cause that he was, or had ever been,

involved in any criminal activity.

Suddenly, a deputy sheriff pulled behind petitioner's vehicle, directing him to pull over to the side of the road. Petitioner stopped the vehicle in front of an apartment building adjacent to the highway. The deputy sheriff, Peter Endres, had no probable cause to believe the defendant was doing anything wrong, or reasonable suspicion to justify an investigatory stop. The deputy had stopped the vehicle at the request of Wade Larsen's parole agent who wanted to search it for a gun.

Within the next hour, while petitioner was unlawfully detained, the parole agent and police officers would arrive at the scene of petitioner's arrest, and subject the car to a vigorous search of its every nook and cranny. The

search would not yield a gun, but "drug paraphernalia", which would then be used in conjunction with cocaine found near the car to convict petitioner of a drug offense.

The stop of petitioner's vehicle and his unlawful arrest were precipitated by a chain of events that had occurred during the previous 24 hours. On the preceding day, Detective Thomas Kretschman had been investigating the possibility that Wade Larsen was involved in a burglary. Kretschman contacted Larsen's motel manager, who informed him that he had previously heard gun shots from the area of Larsen's room, where Larsen told him he kept a gun. A motel resident stated that he had recently seen Larsen carrying a handgun which he put in his pants pocket just before driving away in his car.

Sensing a probable parole violation, Kretschman called Larsen's parole agent, Neil Lane, to inform him of Larsen's potential possession of a handgun. Lane decided to search for the firearm during a scheduled home visit with Larsen the following day. Prior to the search, Lane informed his supervisor, Kristine Flood, of the possibility that his client possessed a handgun and asked for permission to search Larsen's residence pursuant to Administrative Rule HSS § 328.21(3). This is the identical administrative rule which was upheld by a 5-4 ruling in Griffin v. Wisconsin, 483 U.S. _____, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987).

The following day, Lane met Larsen at his apartment in the company of Detective Kretschman and another detective and

expressed his intention to do the search. Larsen apparently attempted to divert the focus of the search by implying to the parole agent that he was probably looking for a plastic gun. However, while in the bedroom, the agent lifted the mattress and found a loaded .38 caliber revolver with a package of cartridges. When the motel resident was shown this weapon, he excluded it as the gun he had previously seen. Larsen was taken into custody for a parole violation for possession of the handgun and the apartment search was terminated.

The administrative search rule required an agent to seek advance approval from his supervisor before searching a client's residence or property <u>unless</u> there were exigent circumstances. According to HSS

328.21(1), exigent circumstances are present if there is "suspicion that the parolee will destroy contraband or use a weapon." Although Larsen was already in custody and could neither destroy contraband or use a weapon, the parole agent decided to conduct a search of Larsen's car without his supervisor's approval based upon the informant's uncorroborated observation. The search of the car was justified on the ground that since the weapon described by the motel resident was not found in Larsen's apartment, it "may be in the vehicle." (R.49:14)

Minutes later Larsen's car, driven by petitioner, was seen passing by Larsen's partment. Lane requested it to be stopped so it could be thoroughly searched for another weapon. After petitioner was

stopped, one of the police detectives present at the search ordered the deputy sheriff to detain him for questioning.

Upon stopping the Oldsmobile, the officer exited his squad and carefully observed petitioner exit his vehicle in an "unusual manner"; by stooping first and then slowly turning to face the officer. Endres never observed petitioner do anything which would resemble pitching or throwing an object. He ordered petitioner to come toward him, and performed a pat search for weapons. Finding none, he placed petitioner in the backseat of his squad car. Based upon directions given to him by the detectives, he did not permit petitioner to leave.

Endres and petitioner waited in the squad car for approximately 20 minutes before Lane, the detectives and Larsen

arrived. During this time, petitioner was never advised of his constitutional rights. When asked by the deputy what he was doing at the apartment complex he replied, "I was visiting a friend."

When parole agent Lane arrived at the scene of petitioner's arrest, the search of the car began. It was thorough. According to Lane:

> I began with the passenger compartment. I searched throughout the vehicle without actually disassembling it, going through underneath the dash, the seats, the glove compartment, basically everything I could search. ... Then I searched the motor compartment, air cleaner, the windshield washer reservoir, basically everything I could observe, and lastly I opened up the trunk and searched the trunk area. (R.79:76)

As Lane proceeded to search the trunk, he observed two shoe box sized cartons. Upon lifting the covers he noticed what appeared to him to be "drug

paraphernalia".

While the search was in progress, a woman, standing on a second floor balcony, directed the detectives' attention to a small white package under a car parked adjacent to the Oldsmobile. Detective Kretschman ultimately retrieved the package and upon examining it concluded that it contained cocaine. He then walked over to Deputy Endres' squad and instructed the driver be placed under arrest for possession of cocaine. It was at this time that Detective Kretschman learned the identity of the driver. (R.49:25) He recognized him from prior contacts as the petitioner, Ronald Pagel.

Petitioner was then formally arrested, the contents of his wallet were seized, and a blood test was taken which revealed the presence of cocaine. Several

days later, a federal grand jury indicted him for possession with intent to distribute the cocaine found at the scene of the arrest contrary to 21 U.S.C. § 841(a)(1).

In pretrial proceedings, the Government expressed its intent to introduce all evidence seized as a result of the stop of the Oldsmobile, including petitioner's statements to Deputy Endres, the results of the blood test, the drug paraphernalia seized from the trunk of the Oldsmobile, and the contents of petitioner's wallet. Petitioner moved to suppress all of the fruits of his unlawful stop, arrest and subsequent search.

After an evidentiary hearing on the suppression issues, the magistrate concluded that after the defendant was pat-searched and placed in the back of the

squad car, he was effectively arrested. Since the arrest was obtained without probable cause, it was unlawful. The magistrate therefore concluded that since there was no basis for an arrest, or even an investigatory stop, that all of the fruits of the arrest should be suppressed.

Ultimately, the district court ordered the suppression of defendant's statements, the result of the blood tests, and the contents of his wallet as the fruit of his unlawful arrest. The trial court, however, refused to suppress the fruits of the search of the car, since the search of the car was justified as a parolee search founded on reasonable grounds. The trial court also refused to suppress defendant's identification which was made by the investigating officer's at the scene just prior to being arrested for

the drug charge on the grounds that since the detective recognized the individual in Deputy Endres' squad as Ronald Pagel from prior contacts, that his identification had an "independent source."

Both the drug paraphernalia and petitioner's identification were admitted into evidence at trial. Petitioner was ultimately convicted of one ocunt of possession of cocaine with intent to deliver contrary to 21 U.S.C. § 841(a)(1). Petitioner appealed to the Seventh Circuit Court of Appeals challenging the district court's ruling on the admissibility of this evidence. The Court of Appeals affirmed his conviction and it is from that adverse ruling that he seeks reivew by this Court.

REASONS FOR GRANTING REVIEW

I. SUPREME COURT REVIEW IS REQUIRED TO DETERMINE WHETHER A NEW PAROLEE SEARCH EXCEPTION IS WARRANTED IN AUTOMOBILE SEARCH CASES.

To date, the United States Supreme Court has articulated five major exceptions to the search warrant requirement with respect to automobile searches and seizures, none of which apply here. The first, and broadest, exception is, when law enforcement officers have probable cause to search a moving vehicle. See, Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). The second exception is when the automobile search is incident to a valid arrest. See, New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). The third exception articulated by this Court is based upon valid consent,

Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The fourth exception is when a motor vehicle search is conducted pursuant to a good faith police inventory of the automobile contents. Colorado v. Bertine, ___ U.S. ____, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987). The fifth and final exception, thus far set forth by this Court, is when the automobile search was conducted in order to protect the safety of police officers or the general public. See, Michigan v. Long, 469 U.S. 1031, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) (a search during an investigative detention was permitted to protect a police officer and others nearby); and New York v. Class, 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986), (police officer intrusion into a motor vehicle justified to observe a

vehicle identification number so as to promote governmental interests in highway safety). See, LaFave, Search and Seizure, 2d Ed., § 7 pg. 1-125; Annotation, Warrantless Searches of Vehicles, 89 L.Ed.2d 939.

None of the five preceding exceptions apply to the facts of this case. Neither the police officers, nor the parole agent, had probable cause to believe that either a weapon or contraband would be found in Wade Larsen's automobile. Police officers were only able to conclude that another weapon "may be in the vehicle" based upon the results of the apartment search and an uncorroborated statement by the informant that he had seen Larsen with an automatic rather than a revolver. (R.49:14)

The Court of Appeals' decision

concedes the absence of probable cause in stating that:

> [W]hen Lane found the revolver in the bedroom, and Jacobson said it was not the automatic weapon he had seen days before, it was more than reasonable to suspect that there was another automatic weapon and that it might have been in Larsen's car. (Emphasis Added) (Opinion, p. 9)

In Griffin v. Wisconsin, 483 U.S. ____, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987), a recent case dealing with a probationer search for a weapon under the same Administrative scheme as this case, this Court rejected a similar factual basis for concluding the presence of probable cause.

> [I]t is most unlikely that the unauthenticated tip of a police officer ... merely stating that Griffin 'had or might have guns' in his residence not that he certainly had them would meet the ordinary requirement of probable cause. (Emphasis Added) (At page 720)

The word "might" indicates that the police officers and the parole agent only had a "hunch", or suspicion, based upon the informant's potentially unreliable observations that another gun was possibly in Larsen's car. Although a precise definition of probable cause has always been elusive, this Court has clearly stated that "possibility" is not sufficient as probable cause is "more than bare suspicion ... [i]n dealing with probable cause ... the very name implies, we deal with probabilities." Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). See, LaFave, Search and Seizure, a Treatise on the Fourth Amendment, 2d Ed. § 3.2(e), p. 586-606.

None of the other remaining four exceptions apply to the facts of this

case. The search was not conducted incident to a valid arrest since petitioner's detention while the search was in progress was held by the district court to be unlawful. Likewise, the search was not conducted either pursuant to a police inventory, or by consent.

Finally, no one has yet contended that the search was undertaken to somehow promote the safety of the officer's involved or the general public. Perhaps the only arguable application of current Fourth Amendment jurisprudence to justify the validity of the search in this case is that the search of Larsen's vehicle was incident to Larsen's arrest. Since, however, Larsen's arrest was not contemparaneous with the search of a vehicle that was miles away, it would be impossible to sanction the search under

the rule set forth in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

The opinion below appears to carve out a new sixth exception to the warrant requirement in automobile cases where no probable cause, a valid arrest, consent, or protection of the officers or the public are at stake. This new exception permits a parole agent to search a parolee's "effects" on "reasonable grounds" no matter where they are or who has control of them.

The Court of Appeals reasons that since the search was undertaken pursuant to a valid regulation, it was legal and the fruits of the search can be introduced against any citizen with full Fourth Amendment rights and expectations of privacy. Taken to its logical conclusion,

the Court of Appeals holding would sanction a search of a parolee's property upon less than probable cause even if the property were located in the home of a third person.

Supreme Court review is necessary to determine whether a search of a parolee's automobile under the lawful control of a third party amounts to a new exception to the warrant requirement so as to permit an automobile search on less than probable cause, without consent, a valid arrest or other public policy justification. If so, then is it constitutionally permissible to introduce evidence seized on less than probable cause against a citizen with full Fourth Amendment protections?

II. SUPREME COURT REVIEW IS NEEDED TO DETERMINE WHETHER THE COURT'S DECISION IN GRIFFIN V. WISCONSIN PERMITTING A PAROLEE SEARCH UPON REASONABLE GROUNDS SHOULD BE

EXTENDED TO OVERRIDE AN ORDINARY CITIZEN'S CONSTITUTIONAL RIGHT AGAINST NONCONSENSUAL SEARCHES AND SEIZURES UPON LESS THAN PROBABLE CAUSE.

The Court's decision in Griffin v. Wisconsin, supra, upheld the exact Administrative Rule at issue in this case. It did so on a number of policy grounds.

First, the Court found that:

> The state's operation of a probation system ... presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements.

The Court also pointed out that probationers and parolees:

> ...[D]o not enjoy 'the absolute liberty to which an average citizen is entitled' but only conditional liberty properly dependent on observance of special ... restrictions. (Citations Omitted) These restrictions are meant to assure that the probation served is a period of genuine rehabilitation and that the community is not harmed by the probationer being at large.

(Emphasis Added) (At page 718)

The Court concluded:

> We think that the probation regime would also be unduly disrupted by a requirement of probable cause ... In some cases -especially those involving drugs or illegal weapons -the probation agency must be able to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before a probationer does damage to himself or society. (Emphasis Added) (At page 721)

This case presents a clear conflict between the "special needs" of the state in a parole supervision regime and the full Fourth Amendment rights of the "average citizen". Where should this balance be struck? The opinion below seems to imply that any search conducted pursuant to an administrative rule permitting parolee searches is legal per se. Yet the Griffin decision was careful not to adopt such a broad ruling.

> We think the Wisconsin Supreme Court correctly concluded that this warrantless search did not violate the Fourth Amendment. To reach that result, however, we find it unnecessary to embrace a new principal of law, as the Wisconsin court evidently did, that any search of a probationer's home by a probation officer satisfies the Fourth Amendment as long as the information possessed by the officer satisfies a federal "reasonable grounds" standard. (Emphasis Added) (At page 717)

By adopting a per se rule, the Court of Appeals ignores the question of whose interest takes precedence when the administrative scheme for the supervision of parolees collides with the Fourth Amendment rights of an average citizen and implicitly extends the decision well beyond its limited scope.

Supreme Court review is needed so that a reasonable balance of the competing interests at stake in this case can be struck to determine whether

Wisconsin's "special needs" to supervise Wade Larsen are sufficiently pressing to override petitioner's Fourth Amendment rights.

There can be no question that as petitioner drove the 1973 Oldsmobile down the highway, the Fourth Amendment rode with him. At the time of the stop, Larsen's car was lawfully in the defendant's possession and control. Lower courts have recognized that the possessor of property has separate and enforceable Fourth Amendment protections while that property is under his or her control. (See, United States v. Lisk, 559 F.2d 1108, 7th Cir. 1977; United States v. Posey, 663 F.2d 37, 7th Cir. 1981) Unlike Wade Larsen, he was not subject to a lessened expectation of privacy that is codified by Administrative Rule HSS §

328.21, which permits a parolee's residence and personal property to be searched at any time on grounds significantly less than probable cause. There is nothing in this Rule or the Fourth Amendment that stands for the diminution of an ordinary citizen's Fourth Amendment rights, his expectations of privacy, or his freedom from unreasonable police intrusions. In Griffin v. Wisconsin, supra, this Court upheld the Administrative Rule at issue in this case on the grounds that the "special needs" of the state to supervise, control and rehabilitate a convicted criminal while minimizing risks to society justified a relaxation of normal Fourth Amendment standards pertaining to warrantless searches of a probationer's home. There were no such "special needs" or exigent

circumstances to justify a relaxation of normal Fourth Amendment protections accorded to petitioner.

At the time Larsen's vehicle was searched, he was already in custody, and there was clearly no possibility that he was about to endanger himself or society.

HSS § 328.21(3) requires advance approval of the parole agent's supervisor before a parolee's property may be searched unless exigent circumstances exist, such as "suspicion the parolee will destroy contraband or use a weapon". In this case, no approval from the supervisor for a search of the car was sought and the "exigent circumstances" itemized in the rule were absent since Larsen was in custody. In fact, neither the government nor the parole officer have ever contended that "exigent circumstances" justified

the search of petitioner's car.

By its own terms, the administrative rule in this case is limited only to persons who are on parole or probation supervision. This rule cannot be used to diminish the constitutional rights of third parties, who have not been convicted of crimes and who enjoy the full breadth of constitutional protections enjoyed by ordinary citizens. The Griffin decision merely upheld an administrative search scheme which was directed at persons who, after being convicted of crimes, were committed to the legal custody of the Wisconsin Department of Health and Social Services, and therefore made subject to its rules and regulations. The holding in Griffin cannot be stretched to stand for "a new principal of law" that any search of a parolee's property, no matter where

it is and who has it, is "reasonable" under the Fourth Amendment. A parolee's diminished Fourth Amendment rights cannot erode the rights of an ordinary citizen, unless truly compelling societal interests warrant a diminution of those rights.

Thus far, neither the government, nor the Court of Appeals, has articulated precisely what overriding societal interests justified the dilution of petitioner's Fourth Amendment rights in this case.

The expectation of privacy by an individual lawfully operating an automobile upon public roads cannot be equated with the diminished Fourth Amendment rights of a parolee or the diminished Fourth Amendment rights of a prisoner in his cell. See, Michigan v.

Long, supra) In New York v. Class, supra, this Court noted that:

> A citizen does not surrender all the protections of the Fourth Amendment by entering an automobile. (At page 89)

Other circuits appear to be split on the question of how much power parole and probation officers have, or ought to have, in our society. In the United States v. Workman, 585 F.2d 1205 (4th Cir. 1978), the Court of Appeals recognized that federal parole officers are bound by the probable cause standards of the Fourth Amendment with respect to parolee searches. More poignantly, the Ninth Circuit Court of Appeals in United States v. Merchant, 760 F.2d 963 (9th Cir. 1985) recently stated:

> We have condemned the practice of using a search condition imposed on a probationer as a broad tool for law enforcement.

Supreme Court review is necessary to resolve the apparent conflict among the circuit courts concerning where the balance between these interests should be struck.

In this case, the ultimate focus of the search was not on a parolee, but on an average citizen. If as pointed out in Griffin, parolees do have lessened expectations of privacy and diminished Fourth Amendment rights, then evidence seized on less than probable cause should only be admissible against those with diminished Fourth Amendment protections. The administrative rule did not give the parole officer lawful authority to usurp the defendant's liberty interests, even if it was necessary to execute the authority he did possess. Defendant was not subject to the parole rules, the administrative

search scheme, or diminished Fourth Amendment privileges. Although lawful authority existed to infringe the parolee's rights, this authority could not be exercised without trampling petitioner's Fourth Amendment rights.

This Court has consistently recognized that legitimate right to search, or seize a person or object, does not destroy other independent rights. In Welch v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), this Court held that although probable cause to arrest an individual existed, it did not authorize a warrantless entry into a dwelling necessary to make the arrest. In Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), the Court held that plain view alone was insufficient to justify a warrantless

entry to seize an object in plain view absent exigent circumstances. Also, in Steigald v. United States 451 U.S. 204, 101 S.Ct. 1642, 16 L.Ed.2d 38 (1981), this Court held that a warrant for the arrest of a visitor did not authorize a warrantless entry of a third person's residence, even if it was necessary to make an arrest.

Recently, this Court emphasized the need for probable cause before the "plain view" doctrine can be invoked. In Arizona v. Hicks, ____ U.S.____, ____ S.Ct. ____, 94 L.Ed.2d 347 (1987), the Court held that reasonable suspicion to conclude that stereo components were stolen did not justify moving the equipment in order to see the serial numbers. This constituted a search that was not based upon probable cause.

The right of the petitioner to be free from an unlawful stop and arrest and to be free from a search upon less than probable cause that may ultimately produce evidence used against him in a criminal trial is purely a personal right. These rights cannot be infringed simply because a parole agent decides to do so.

The Court of Appeals decision below raises the specter of an extension of the holding in Griffin v. Wisconsin, far beyond its well-defined limits. Taken to its logical conclusion, the Court of Appeals decision permits any search of a parolee's property, no matter what constitutional rights of ordinary citizens are dashed in the process. Supreme Court review is necessary to define the limits of Griffin, and strike a balance between the competing interest of the state and

the individual in parole or probation supervision cases. If no balance is struck, and there is a danger that the probable cause standard inherent in the Fourth Amendment may be eviscerated by a new parolee or probationer search exception.

Perhaps the key issue presented in this case is when competing interests collide, over Fourth Amendment rights, what ought to be the standard of reasonableness for the search? In New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720(1984), the Supreme Court used a standard of "reasonableness" to strike a balance between competing needs of a school and the privacy interests of the student to define the limitations of the Fourth Amendment in a school setting. The Court stated:

> Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of a standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails'. (Citations Omitted) On the one side of the balance, are the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order. (At page 337)

Petitioner contends that as an "average citizen" his legitimate expectations of privacy and personal security, in common with those of other citizens, are far outweighed by the government's special needs to supervise Wade Larsen's parole. Neither the Court of Appeals holding, nor the government, have articulated any facts, public

policy, or analysis to the contrary. Supreme Court review is necessary to set clear limits on the holding in Griffin, and to strike a reasonable balance between the interests of the state and the individual in parole and probationer search cases.

III. SUPREME COURT REVIEW IS NEEDED TO DETERMINE WHETHER THE PETITIONER'S IDENTIFICATION IS A SUPPRESSIBLE FRUIT OF AN UNLAWFUL ARREST.

Although the district court found that the petitioner's initial detention was unlawful, it refused to suppress petitioner's identification as the fruit of that unlawful arrest. The Court of Appeals refused to reverse the district court's conclusion that petitioner's identification had an independent source based upon the fact that the detective recognized the detained driver as the petitioner from prior contacts, rather

than from the arrest itself. Detective Kretschman admitted that prior to placing petitioner under arrest for possession of a controlled substance:

> I didn't know who the person in the backseat was until I went over there and then advised them to place that person under arrest for possession of the cocaine. (R.49:25)

Kretschman's testimony is, therefore, unequivocal, that the defendant was identified only as a direct consequence of his unlawful arrest. Clearly, without the unlawful arrest, or the unlawful stop, the defendant would never have been identified as the driver of the car. The fact that Detective Kretschman identified him from prior contacts as opposed to examining his driver's license does not change the relationship between the unlawful action (defendant's arrest), and the recovery of defendant's identification, the only

source of the defendant's identification was his own unlawful arrest. There was no independent source, nor any other means to extirpate that primary and direct taint.

In Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the court stated:

> The exclusionary rule has traditionally barred from trial physical tangible materials obtained either during or as a direct result of an unlawful invasion ... Similarly testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. (At page 485)

The court refined this principle as follows:

> We need not hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is

> whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. (At page 488)

.The same principle was used by the court in United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 1149 (1967), to exclude as a "poisonous fruit" identification at trial when based solely upon an unconstitutional lineup identification, or where the trial identification merely reiterated an unlawfully obtained pretrial identification.

In United States v. Crews, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980), the defendant had been unlawfully arrested by police and while in custody was identified by the robbery victim. The

court held that the at-trial identification was not a fruit of the earlier illegal arrest since the victim testified from the independent mental image she acquired at the time of the crime, which was independent of any unlawful police behavior.

Under the principle of Wong Sun, Wade, and Crews, supra, the defendant's identification at trial as the driver of the Oldsmobile should have been suppressed. Under the circumstances it was unquestionably the direct result of police exploitation of Ronald Pagel's unlawful stop and arrest.

In United States v. Crews, supra, the majority of the Court's opinion, written by Justice Brennan, reserved the question of whether a defendant's face can ever be considered evidence suppressible as the

"fruit" of an illegal arrest. Five members of the Court, although concurring in the result reached in Crews, rejected this possibility by the rationale of Frisbie v. Collins, 342 U.S. 519, 96 L.Ed. 541, 72 S.Ct. 509 (1952). The facts of this case differ markedly from that of Crews given the method by which petitioner was identified by Detective Kretschman. Supreme Court review should be granted to resolve this issue.

CONCLUSION

For the reasons cited in this Petition, this Court should grant review of the Court of Appeals decision.

Dated: October 14, 1988.

O'BRIEN & REYNOLDS, S.C.

BY:

Glenn C. Reynolds
Attorney for Petitioner

In the

United States Court of Appeals

For the Seventh Circuit

No. 87-2703

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONALD L. PAGEL,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 87 CR 37—**Barbara B. Crabb**, *Judge.*

ARGUED FEBRUARY 26, 1988—DECIDED AUGUST 16, 1988

Before BAUER, *Chief Judge*, POSNER, *Circuit Judge*, and PELL, *Senior Circuit Judges.*

BAUER, *Chief Judge.* Ronald Pagel appeals from his conviction for possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). He argues that certain evidence discovered in the search of a vehicle he was driving should have been suppressed at trial because the search violated his Fourth Amendment rights, and that the trial court erred in refusing to admit certain of his proffered evidence at trial. We reject both arguments and affirm his conviction.

I.

A.

In the spring of 1987, Detective Thomas Kretschman of the Dane County, Wisconsin Sheriff's Department was investigating a burglary that had occurred in Verona, Wisconsin. During the course of his investigation, he interviewed two people who had overheard two men talking in a Verona tavern about the burglary. He also learned that a parolee named Wade Larsen was living in a motel in Verona. Kretschman decided to see if Larsen matched the description of either of the men the interviewees had overheard at the Verona tavern.

Kretschman called Officer Ensloe of the Verona Police Department, who happened to live at the same motel. Ensloe told Kretschman that another motel resident, Robert Jacobson, had recently observed Larsen with a handgun. Kretschman contacted the manager of the motel, a Mr. Krueger, who stated that he had heard gunshots from the area of Larsen's apartment, and that other residents had complained of shots. Krueger also told Kretschman that Larsen had told him that he kept a gun in his room and that he had fired it on occasion. Kretschman then contacted Jacobson, who told him that on April 12, 1987, he saw Larsen drive into the motel parking lot in a 1973 Oldsmobile. Jacobson said he saw Larsen get out of the car, go into the motel, and return to the car carrying a .25 or .32 caliber handgun. According to Jacobson, Larsen put the gun in his pocket and hurriedly drove away.

Sensing a potential parole violation, Kretschman called Larsen's parole agent, Neil Lane, and told him of Larsen's possible possession of a handgun. Lane decided to search for the gun during a scheduled home visit with Larsen the next day, and asked Kretschman to accompany him and, if necessary, assist him in handling Larsen. Lane then told his supervisor, Kristine Flood, about Kretschman's information concerning Larsen and asked for permission to search Larsen's home pursuant to Wis. Admin.

Code, HSS § 328.21(c), which provides that "[a] search of a client's living quarters or property may be conducted by field staff if there are reasonable grounds to believe that the quarters or property contain contraband. Approval of the supervisor shall be obtained unless exigent circumstances, such as suspicion the parolee will destroy contraband or use a weapon, require search without approval."[1] Pursuant to the regulation, Flood gave Lane verbal authorization to search Larsen's residence.

The next day, at approximately 5:15 p.m., Lane met Kretschman and a Detective Hughes at Larsen's motel in Verona. While the detectives waited in their car, Lane knocked on Larsen's door. No one answered. Soon after, Kretschman saw Larsen walking toward the motel. When Kretschman got out of his car, Larsen turned around,

---

[1] That regulation provides further that

> . . . In deciding whether there are reasonable grounds to believe that a client possesses contraband or that a client's living quarters or property contain contraband, a staff member shall consider:
>
> (a) The observations of staff members;
>
> (b) Information provided by informants;
>
> (c) The reliability of the information relied on. In evaluating reliability, attention shall be given to whether the information is detailed and consistent and whether it is corroborated;
>
> (d) The reliability of the informant. In evaluating reliability, attention shall be given to whether the informant has supplied reliable information in the past and whether the informant has reason to supply inaccurate information;
>
> (e) The activity of the client that relates to whether the client might possess contraband;
>
> (f) Information provided by the client that is relevant to whether the client possesses contraband;
>
> (g) The experience of a staff member with that client or in a similar circumstance;
>
> (h) Prior seizures of contraband from the client; and
>
> (i) The need to verify compliance with rules of supervision and state and federal law.

walked around the side of the motel, and disappeared. After a brief search of the area, the detectives and Lane returned to Larsen's apartment, where Larsen reappeared a short time later. Lane then told Larsen that he was going to search Larsen's apartment because he had information that Larsen had a gun and was a robbery suspect. Larsen voiced no objection.

When the group entered Larsen's living area, Larsen said something like, "You're probably thinking of this," and picked up a plastic pellet gun from a nearby stand. When Kretschman took the plastic gun and showed it to Jacobson, however, Jacobson said it was definitely not the same gun he had seen two days before. Lane then expanded his search to Larsen's kitchen and bedroom, looking for the gun described by Jacobson. In the bedroom, Lane lifted a mattress and found a loaded .38 caliber revolver with a package of cartridges. Lane gave the gun to Kretschman, who unloaded it and showed it to Jacobson. But Jacobson said it, too, was definitely not the gun he had previously observed. At that point, Larsen was taken into custody for a parole violation and the apartment search ended.

While the apartment search was in progress, Dane County Deputy Norbert Peter Endres arrived at the scene to see if the detectives needed assistance. Kretschman told Endres to look for Larsen's 1973 Oldsmobile and suggested that Endres talk to Jacobson for a more detailed description of the car. Jacobson described Larsen's vehicle to Endres as a gold Oldsmobile Cutlass Supreme with a brown top, license number AHE-511. A short time later, Jacobson told the officers he had just seen Larsen's car driving past the motel. The officers then passed this information on to Lane, who by now had discovered the .38 caliber revolver beneath the mattress in Larsen's bedroom. Lane requested the officers to stop Larsen's car so it could be searched and, at the direction of either Kretschman or Hughes, Endres went off to stop Larsen's car. Endres was not instructed to arrest the driver, nor did he know the reason for stopping Lar-

sen's car; he only knew that a question of a weapon was involved.

After driving a few miles in the direction toward which Jacobson saw the Oldsmobile heading, Endres spotted Larsen's car and activated his warning lights. Pagel was driving. Instead of stopping on the side of the road, however, Pagel drove the Oldsmobile into the parking lot of an apartment complex and parked in a stall directly in front of one of the apartments. Endres pulled up right behind and perpendicular to the vehicle, and contacted Hughes and Kretschman, who were still back at the motel. Hughes told Endres to get the driver out of the Oldsmobile and to detain him until the detectives could speak with him. Lane then left for the apartment complex in his own car. Detective Hughes followed in an unmarked car, with Kretschman and a handcuffed Larsen in the back seat.

After stopping behind the Oldsmobile, Endres got out of his car carefully. According to Endres, at the same time, Pagel also got out of the Oldsmobile in an "unusual manner"—stooped over with his back to Endres, then slowly turning and standing upright to face Endres. Endres ordered Pagel to come toward him and, near the trunk of the Oldsmobile, performed a pat-down search. Finding no weapons, Endres placed Pagel in the back of the squad car. The only verbal exchange initiated by Endres took place when Endres asked Pagel what he was doing at the apartment complex and Pagel responded that he was visiting a friend.

A short time later, Lane, Hughes, and Kretschman arrived. Lane obtained the keys from Pagel and searched the Oldsmobile's interior, then the trunk, in which he discovered two cartons containing drug paraphernalia. This discovery prompted Lane to turn to Hughes and Kretschman for advice, who suggested that the car be seized and a search warrant for the trunk obtained. Lane then completed the search for a weapon, but none was found.

While Lane was searching Larsen's vehicle, a woman standing on a second-floor balcony some thirty feet from the Oldsmobile directed the officers' attention to a small white package under a car parked next to and about three or four feet from the Oldsmobile. Lane picked up the package and gave it to Kretschman, who determined that it was cocaine. Kretschman then walked over to Endres's squad car and placed Pagel under arrest.

B.

On April 15, 1987, Pagel was charged by complaint with possession with intent to distribute the cocaine found at the scene of his arrest in violation of 21 U.S.C. § 841(a)(1). A few days later, the grand jury handed down a superseding indictment for the same offense.

Before trial, Pagel moved to suppress the fruits of what he alleged was an unlawful stop and search, including his statement to Deputy Endres and the drug paraphernalia discovered in the Oldsmobile. In addition, Pagel sought to suppress at trial his identification, which, he alleged, also was obtained as a result of his unlawful arrest. After an evidentiary hearing, the magistrate concluded that the stop and search of the Oldsmobile was constitutional as a legitimate parolee search, but that, after Pagel was pat-searched and placed in the back of Endres's squad car, he was effectively arrested and, because there was no probable cause for an arrest, it was unlawful. The district court agreed. It held that because the search of the Oldsmobile was lawful pursuant to Wis. Admin. Code, HSS § 328.21(3), stopping Pagel was a necessary step in effecting that search, and it therefore refused to suppress the evidence obtained from the search of the car. The court also refused to suppress Pagel's identification, finding that, because Kretschman had identified Pagel from prior contacts, the identification had an "independent source." Based upon the unlawful arrest, however, the court suppressed Pagel's statements.

Pagel's trial lasted less than two days. Pagel neither testified nor produced any witnesses after the government rested. During the government's case, however, he did produce photographs of the scene of his arrest taken several days after the incident. The photographs purported to portray the positions of Larsen's Oldsmobile and the car next to it, under which the package of cocaine was found. The defense sought to show that, given the relative positions of Pagel, Endres, and the two vehicles, it would have been impossible for Pagel to have tossed the cocaine without detection. When the defense moved for admission of the photographs into evidence, the government objected on the ground that they did not adequately reflect the scene at the time of the stop and search. The district court sustained the government's objection and refused to admit the photographs into evidence. After less than an hour of deliberations, the jury asked for the photographs, at which point the defense again moved to admit them into evidence. Again, the court denied the motion. About an hour later, the jury returned with a guilty verdict.

II.

A.

Pagel first argues that the stop and search of Larsen's Oldsmobile was unlawful and that the fruits of that stop and search should have been suppressed at his trial. He does not challenge the Wisconsin regulations allowing Lane to search Larsen's living quarters or property on "reasonable grounds" to believe the property contained contraband. Nor could he. The search of Larsen's motel room and automobile were made by a parole agent pursuant to the same regulations that were upheld in *Griffin v. Wisconsin*, ___ U.S. ___, 107 S. Ct. 3164 (1987). There, the Court upheld the warrantless search of a probationer's residence, holding that it was " 'reasonable' within the meaning of the Fourth Amendment because it was conducted pursuant to a valid regulation governing probationers." *Id.* at 3171. Instead, Pagel argues that

Larsen's parole status was merely a pretext for violating Pagel's Fourth Amendment rights by stopping and searching Larsen's car, which he was driving. According to Pagel, "Lane's authority to conduct an administrative search did not create implied authority to infringe the defendant's liberty interests by stopping the car or searching property lawfully under his control."

We reject this argument, as did the magistrate and the district court. The target of the stop and search was Larsen's property, not Pagel, and the search of the car by Lane was lawful under the applicable Wisconsin regulations. It was, of course, necessary to stop the car before Lane could search it, but the stop itself did not violate Pagel's Fourth Amendment rights. That Pagel happened to be driving the car at the time Endres executed the stop to enable Lane to search it cannot render an otherwise legal stop and search illegal. Indeed, under Pagel's reasoning, any time a third person not the target of a lawful search pursuant either to a warrant or a valid regulation such as Wisconsin's happened to be in the residence or car that was the target of the search, the search would be rendered illegal. Nonsense. If Pagel were driving a car that, unknown to him, was stolen, police clearly could have stopped the vehicle. And if Pagel had been present at Larsen's residence at the time Lane conducted the parole search and, during the search, committed an illegal act in front of Lane and law enforcement officers, he clearly could have been arrested.

Pagel also argues that when parole agent Lane had the law enforcement officers stop Larsen's Oldsmobile so he could search it, "exigent circumstances were totally absent." Pagel contends that, because Lane had not received approval to search Larsen's car from his supervisor, exigent circumstances had to exist before the search could be proper under HHS § 328.21. This, too, is nonsense. As the magistrate and district court concluded, there were exigent circumstances. There is no disputing the existence of reasonable grounds to believe that Larsen had an automatic weapon in his house or car. Two witnesses, Jacob-

son and Krueger, indicated that Larsen possessed at least one handgun. Indeed, Krueger and others in the motel had heard gunshots and Larsen had admitted that he had fired a gun. Moreover, when Lane searched his motel apartment, Larsen had behaved suspiciously outside the motel, had attempted deception with the plastic gun, and had lied about the presence of any weapon. Thus, when Lane found the revolver in the bedroom and Jacobson said it was not the automatic weapon he had seen days before, it was more than reasonable to suspect that there was another automatic weapon and that it might have been in Larsen's car. As the magistrate pointed out, under these circumstances, a warrantless search of the car would have been justified under conventional Fourth Amendment jurisprudence. *See United States v. Ross*, 456 U.S. 798, 804-09 (1982); *Griffin*, 107 S. Ct. at 3170. In short, the stop and search of Larsen's vehicle was lawful and the fruit of the search—the drug paraphernalia found in the Oldsmobile's trunk—was admissible.

B.

Pagel also argues that his identification was the fruit of his unlawful arrest and should have been suppressed at trial. Although the magistrate did not address this issue directly in his report and recommendation, he did find that Endres had independently identified Pagel when he stopped Larsen's car. The magistrate indicated that, because he had already determined that the stop was lawful, Pagel's identification was not the product of any illegality and, accordingly, was admissible under the "independent source" doctrine.

Pagel objected to the magistrate's finding, arguing that he was not identified by anyone until after he was unlawfully placed in custody. The district court rejected Pagel's argument, however, finding that "there was testimony at the evidentiary hearing which establishes that the defendant was identified prior to and independently of the illegal arrest." According to the court

> Kretschman testified that in the course of his investigation of a burglary in the city of Verona, he learned that a parolee or probationer named Wade Larsen was living in Verona, and that he decided to check to see if Larsen matched the description of several burglary suspects. . . . Detective Kretschman testified that he contacted Officer Ensloe of the Verona Police Department. Detective Kretschman further testified that he learned from Officer Ensloe that Dane County Sheriff's Department Deputy Reis had recently made a traffic stop involving Larsen, and that Deputy Reis had gone to the motel where Larsen lived in order to issue a citation to Larsen and had made contact with defendant at Larsen's motel room. . . . Detective Kretschman testified that he had thus become aware of the fact that Larsen and defendant frequented the same hotel room from talking with Officer Ensloe, before he contacted Probation Officer Lane or went with him to Larsen's motel room. *Ibid.* Thus, defendant had been identified by Detective Kretschman prior to and independently of the illegal arrest. Furthermore, Detective Kretschman testified that he believed that someone "obtained [defendant's] identification prior to my arriving and told me who he was." . . . In view of the record evidence that defendant was identified independently of the illegal arrest, the magistrate was correct in concluding that defendant's identification was admissible.

Although Pagel on appeal highlights some testimony that does seem to contradict the magistrate's and district court's view that Pagel was identified before he was unlawfully placed in custody, we are unable to conclude that the magistrate's and district court's findings were clearly erroneous and, therefore, that the district court erred in refusing to suppress Pagel's identification.

C.

Finally, Pagel argues that the district court erred in refusing to admit into evidence the photographs depicting the relative position of Larsen's car and the adjacent vehicle under which the cocaine was found. According to Pagel, some government witnesses testified that, although they did not recreate the exact scene of the stop, the photographs accurately depicted the relative positions of the two vehicles and were probative, the court should have admitted them into evidence. The court, however, based on the testimony of Endres, found that the photographs did *not* adequately recreate the conditions that existed when Pagel was arrested. Finding that the photographs would therefore tend to confuse and mislead the jury, and that they would not be helpful or relevant to the jury's decision, the court refused to admit the photographs into evidence. On this record, we cannot conclude that the district court abused its broad discretion in excluding this particular evidence and, therefore, will not reverse its evidentiary ruling. *See United States v. Carver*, 809 F.2d 1291, 1297 (7th Cir. 1987).

The defendant's conviction is

AFFIRMED.

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JUDGMENT - ORAL ARGUMENT
UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

August 16, 1988

Before
Hon. William J. Bauer, Chief Judge
Hon. Richard A. Posner, Circuit Judge
Hon. Wilbur F. Pell, Jr., Senior Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 87-2703 vs.
RONALD L. PAGEL,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 87-CR-178
BRABARA (sic) B. CRABB, Judge

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, _____ _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

ORDER

vs.

87-CR-37-C

RONALD L. PAGEL,

Defendant.

Defendant has moved to suppress certain evidence discovered in the search of an automobile he was driving, on the ground that the search was unlawful under Fourth Amendment principles and the applicable Wisconsin regulations governing parole and probation supervision, and on the further ground that those regulations are unconstitutional on their face and as applied. He has moved also to suppress a statement he made to the police, on the ground that it was the product of an unwarned custodial interrogation and the

fruit of an illegal arrest. In a report and recommendation dated July 1, 1987, the United States Magistrate recommended that defendant's motion to suppress the contents of the automobile be denied, and that defendant's motion to suppress his statement be granted.

Defendant has raised two objections to the magistrate's report and recommendations. First, defendant objects to the statement, at page 19, footnote 16, of the magistrate's report, that "Deputy Endres identified defendant at the time Larson's vehicle was stopped," and to the magistrate's failure to recommend suppression of the identification of the defendant. Second, defendant objects to the magistrate's proposed conclusion of law that the stopping of the vehicle that defendant was driving was authorized as a probation search and to the magistrate's

failure to recommend suppression of the evidence obtained as fruit of that stop.

1. Defendant's Motion to Suppress His Identification

Defendant's motion to suppress, filed May 11, 1987, requested suppression of all evidence seized as a result of the stopping, seizure and search of one 1973 Oldsmobile Cutlass, and of the seizure of defendant thereafter, and specifically requested suppression of defendant's identity, in addition to other evidence. The magistrate noted in his report, at footnote 16, page 19, that defendant sought suppression of his identification as a fruit of the unlawful arrest. The magistrate stated in that footnote that Deputy Endres identified defendant at the time Larsen's vehicle was stopped. The magistrate stated further that he had already determined that the stop of Larsen's vehicle was not unlawful, as a

necessary predicate to the search of the vehicle, and concluded that Endres' identification of defendant was not the product of any illegality but was admissible under the "independent source" doctrine.

Defendant contends that nothing in the magistrate's proposed findings of fact or in the record of the evidentiary hearing held before the magistrate on June 10, 1987 supports the statement that Deputy Endres identified defendant at the time Larsen's vehicle was stopped. Instead, defendant argues, the magistrate's proposed findings of fact and the record of the suppression hearing indicate that defendant was not identified until some time after he was stopped and placed in custody by Deputy Endres, when Detective Kretschman approached the car in which defendant was sitting, recognized

him, and ordered his arrest. The magistrate found that defendant was arrested without probable cause. Defendant contends that his identification was the result of his illegal detention, and that accordingly the identification must be suppressed.

Defendant is correct that the magistrate did not propose as a finding of fact that Deputy Endres identified defendant at the time defendant was stopped driving Larsen's vehicle. However, there was testimony at the evidentiary hearing which establishes that defendant was identified prior to and independently of the illegal arrest. Dane County Sheriff's Department Detective Kretschman testified that in the course of his investigation of a burglary in the city of Verona, he learned that a parolee or probationer named Wade Larsen was

living in Verona, and that he decided to check to see if Larsen matched the description of several burglary suspects. Transcript, p. 10. Detective Kretschman testified that he contacted Officer Ensloe of the Verona Police Department. Detective Kretschman further testified that he learned from Officer Ensloe that Dane County Sheriff's department Deputy Reis had recently made a traffic stop involving Larsen, and that Deputy Reis had gone to the motel where Larsen lived in order to issue a citation to Larsen and had made contact with defendant at Larsen's motel room. Transcript, pp.11,27. Detective Kretschman testified that he had thus become aware of the fact that Larsen and defendant frequented the same hotel room from talking with Officer Ensloe, before he contacted Probation Officer Lane or went with him to Larsen's

motel room. Ibid. Thus, defendant had been identified by Detective Kretschman prior to and independently of the illegal arrest. Furthermore, Detective Kretschman testified that he believed that someone "obtained [defendant's] identification prior to my arriving and told me who he was." Transcript, p.25. In view of the record evidence that defendant was identified independently of the illegal arrest, the magistrate was correct in concluding that defendant's identification was admissible.

2. Defendant's Motion to Suppress Evidence Found In Automobile

The magistrate recommended denial of defendant's motion to suppress the fruits of the search of Larsen's car. The search was conducted by a state parole officer, without a warrant, under the authority of regulations adopted by the Wisconsin Department of Health and Social Services

with regard to the supervision of persons on parole. The magistrate found the search of Larsen's car to be lawful under Griffin v. Wisconsin, 47 CCH S.Ct.Bull. p. B4504 (U.S.S.Ct., June 26, 1987), which held that a warrantless search of a probationer's residence under the same regulations as the search in this case was reasonable within the meaning of the Fourth Amendment. The magistrate also found that the fact that defendant was a third party in possession of Larsen's car at the time of the search did not change the analysis, because the search of the car was lawful, it was necessary to stop the car in order to effect the search, and the stop did not infringe any privacy interest of defendant's.

Defendant objects to the magistrate's failure to recommend suppression of the evidence obtained as a fruit of the

stopping of the Oldsmobile driven by defendant, and in particular to the magistrate's proposed conclusion that his status as a third person who was not on probation does not affect analysis of the legality of the stop. Defendant contends that the majority in Griffin v. Wisconsin placed particular emphasis ont he fact that the target of the search was a probationer, and that the court concluded that the Wisconsin administrative scheme provided a constitutionally acceptable substitute for a warrant because the search was conducted pursuant to the administrative scheme and was directed at an individual legitimately subject to the administrative scheme. Defendant further contends that the fact that it was factually necessary to stop the car in order to conduct a search of it does not mean that the stop was automatically

authorized, and that he had a personal liberty interest in being free from the stopping of the car he was driving.

Griffin v. Wisconsin dealt with evidence obtained during a warrantless search of a probationer's apartment, pursuant to Wisconsin regulations authorizing any probation officer to search a probationer's home without a warrant as long as the officer's supervisor approves and there are reasonable grounds to believe that contraband is present. The state sought to use the evidence seized during the search, which included a handgun, at the probationer's subsequent prosecution for possession of a firearm by a convicted felon. The United States Supreme Court held that the search of the probationer's home satisfied the Fourth Amendment because it was carried out pursuant to a

regulation that itself satisfied the Fourth Amendment's reasonableness requirement.

In this case, the search of Larsen's motel room and car was made by a probation officer pursuant to the same regulations that were upheld in Griffin v. Wisconsin. The magistrate found that the requirements of the regulations had been complied with, in that there were reasonable grounds for the search of the car, and in that even thought it was not clear that the probation officer received specific approval from his supervisor to search the car, the regulations authorize an agent to conduct a search without approval in exigent circumstances, and exigent circumstances existed at the conclusion of the apartment search for the unapproved search of the car.

I do not understand defendant to

object to the magistrate's conclusion that the search was in accordance with the regulations. If this were a challenge by Larsen to the use of the evidence obtained during the search of the room and car, Griffin v. Wisconsin would be dispositive of any question of the legality of the search of the car. Therefore, defendant's argument that the evidence obtained when the car was searched should be suppressed depended on his contention that even though the search of the car was legal the evidence obtained should not be used against him.

Defendant cites Ybarra v. Illinois, 444 U.S. 85, 91 (1979) in support of his argument that his rights as a third party were illegally infringed by the search of Larsen's car. In Ybarra, police obtained a search warrant authorizing them to search a tavern and the person of the

bartender for evidence of possession of a controlled substance. The officers who executed the warrant also searched the tavern patrons, even though there was no probable cause to believe that they had committed any offenses under state or federal law. The United States Supreme Court held that evidence found on one of the patrons would be suppressed because there was no probable cause to search him, and the fact that because there was no probable cause to search him, and the fact that coincidentally there was probable cause to search the bartender and the premises did not undercut the requirement that there be probable cause as to each person searched.

This case is distinguishable from Ybarra. In Ybarra, the evidence suppressed had been found during an illegal search of the tavern patrons that

was conducted while a search warrant for the tavern premises was being executed. In this case, in contrast, there was no illegal search of defendant. The probation officer searched Larsen's car, and his search of the car satisfied the applicable constitutional standard of reasonable cause. Defendant was not searched. Unlike the evidence in Ybarra, the evidence that defendant seeks to have suppressed here was found during a legal search where the constitutional standard had been satisfied. The fact that the search of Larsen's car was legal distinguishes this case from the other cases cited by defendant where an illegal action was taken in conjunction with a legal search.

Defendant cites United States v. Place, 462 U.S. 696 (1983) in support of his argument that the stop of Larsen's

car infringed defendant's constitutionally protected Fourth Amendment liberty interest. Place involved a warrantless seizure of luggage on less than probable cause. The Supreme Court held that while the police could detain the luggage temporarily to investigate the circumstances that aroused suspicion, the permissible scope of detention of luggage would be defined by the limitations applicable to investigate detentions of persons.

Place is not on point. In Place, the respondent's luggage was detained in the absence of the constitutionally required standard of probable cause. In this case, in contrast, the constitutional standard for searching Larsen's car was satisfied.

The purpose of the exclusionary rule is to guarantee that illegally acquired evidence shall not be used. LaFave,

Search and Seizure, §11.4, p. 370, citing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The purpose of the exclusionary rule would not be served by suppressing the evidence obtained during the search of Larsen's car, since that search was legal. Therefore, I conclude that the magistrate correctly concluded that defendant's motion to suppress the evidence found during the search of Larsen's car should be denied.

ORDER

IT IS ORDERED that the findings of fact proposed by the magistrate are adopted as the court's own, with the addition of the facts relating to Detective Kretschman's identification of defendant. IT IS ORDERED further that the conclusions of law proposed by the magistrate are adopted as the court's own and that defendant's motion to suppress

the evidence discovered in the search of the vehicle is DENIED; defendant's motion to suppress his identification by Detective Kretschman is DENIED; and defendant's motion to suppress his statement is GRANTED.

Entered this 23rd day of July, 1987.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 87-CR-37-C

RONALD L. PAGEL,

Defendant.

REPORT AND RECOMMENDATION

Defendant Ronald Pagel was charged in an indictment returned April 23, 1987, with one count of possessing cocaine with intent to distribute, in violation of 21 USC §841(a)(1). Defendant has moved to suppress certain evidence discovered in the search of an automobile he was driving, on the ground that the search was unlawful under traditional Fourth Amendment principles and the applicable Wisconsin regulations governing parole/probation supervision (Wis. Admin.

Code, Dept. of Health & SOcial Services §§328.01 et seq.; hereafter, HSS §_____ and on the further ground those regulations are unconstitutional on their face and as construed and applied to defendant. (A copy of Chapter 328, and the Appendix containing the Agency's notes thereto, may be found under Docket No. 33.) Defendant has also moved to suppress a statement he made to police on the ground that it was the product of an unwarned custodial interrogation and the fruit of an illegal arrest.[1]

An evidentiary hearing was held on June 10, 1987, at which the government presented the testimony of Detective

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[1]Those somewhat overlapping motions are found at Docket Nos. 20, 21 and 22, and were clarified at Docket No. 34. A further motion to suppress the results of blood tests has been mooted by the government's representation that it does not intend to use the blood samples in its case-in-chief.

Thomas Kretschman and Deputy Norbert Peter Endres of the Dane County Sheriff's Department, and Neil Lane, a probation and parole agent for the State of Wisconsin. Defendant presented no witnesses. On the basis of the evidence adduced at the hearing, I find the following facts for the purposes of this motion only:

PROPOSED FINDINGS OF FACT

Sometime in March or April, 1987, a substantial residential burglary occurred in the town of Verona, Wisconsin. Detective Thomas Kretschman, a seventeen-year veteran of the Dane County Sheriff's Department, was assigned to investigate. In the course of that investigation, he interviewed two people who had overheard two male subjects talking in a Verona tavern about the burglary. He thereafter learned from a Verona Police Department contact that a parolee by the name of Wade

Larsen was living in the Colonial Motel in Verona, and decided to see if Larsen matched the description of either of the men who had been overheard talking about the burglary.

Kretschman then called an Officer Enloe of the Verona Police Department who, by coincidence, also lived at the Colonial Motel. Enloe told Kretschman that another motel resident, Robert Jacobson, had recently observed Wade Larsen with a handgun, and advised Kretschman to contact Mr. Jacobson and the motel manager about the incident.[2] Kretschman first contacted the manager, Mr. Krueger, who stated that he personally had heard gunshots from the area of Mr. Larsen's apartment, and that

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[2]While not of significance to this motion, Enloe also informed Kretschman that a Deputy Reis had recently visited Mr. Larsen's apartment at the Colonial Motel in connection with a traffic matter, and there made contact with defendant.

other motel occupants had complained of hearing gunshots. The manager further stated that Larsen told him that he had a gun in his room and that he fired it on occasion.

Kretschman also contacted Mr. Jacobson, who advised that on April 12, 1987, he had observed Larsen drive into the motel parking lot in a 1973 Oldsmobile. Mr. Jacobson said that Larsen got out of the car, went into the motel and returned to the car carrying a .25 or .32 caliber, blue-steel, automatic handgun. Larsen then put the gun in his right front pants pocket, got into the car and left in a hurried fashion. Mr. Jacobson told Kretschman that he was a hunter and familiar with guns, and that he was certain that the gun he observed was an automatic, blue-steel or black in color, and about .25 caliber.

Det. Kretschman then called Larsen's parole agent, Neil Lane, of the Wisconsin Department of Health and Social Services. Kretschman informed Lane that Larsen was a suspect in the Verona burglary and related to him the information he had received that Larsen was in possession of a handgun.[3] Lane said that he had already scheduled a home visit with Larsen for the following day, April 14, 1987, and requested that Kretschman be present at that visit, as it was Lane's intention to

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[3] By virtue of his prior conviction of a felony (Gov't Ex. 2) Larsen's possession of a firearm was a violation of state (Wis. Stat. §949.29(2)), and possibly federal (18 USC App. II §1202(a)) law. This would also place him in violation of the parole regulations on several grounds: violation of state statute (Wis. Admin. Code, HSS §328.04(3)(a)); possession of a firearm (HSS §328.04(3)(j); possession of contraband (HSS §328.16(1)(a), (b), which constitutes one of the regulatory grounds for a search of a parolee's person, living quarters or property. (HSS 328.21(2)(b) a and (3). See also Government Exhibit No. 3, "Probation/Parole Rules."

conduct a search for the firearm at that time. He recruited Kretschman for his own protection, not to assist in carrying out the search. The regulations encourage the use of law enforcement officers when the use of force or detention is contemplated. HSS §328.18, .22(2).

Agent Lane subsequently informed his supervisor, Christine Flood, of the information he had received from Detective Kretschman. He asked permission to search pursuant to HSS §328.21(3) and told Flood that he was going to Larsen's residence. He received verbal authorization to proceed, in accordance with normal practice. No specific reference was made to Larsen's car.

At approximately 5:15 PM on April 14, 1987, Agent Lane met Detective Kretschman and Detective Kevin Hughes at the Colonial Motel in the City of Verona. While the

detectives (in plain clothes) waited in their unmarked car, Lane knocked on the door of Apartment #7, which was registered to Larsen. The knock went unanswered, and Lane waited at the door. Shortly thereafter, Detective Kretschman observed Larsen walking on foot from the highway bordering the motel toward the motel. As soon as Kretschman got out of his car, Larsen turned around in the direction from which he had originally come and went around the side or back of the motel. Kretschman lost sight of him at that point. Lane and the detectives then attempted to locate Larsen in the vicinity of the motel, but were unable to do so. They returned to Apartment #7, and Larsen reappeared shortly thereafter.

Agent Lane told Larsen that he was going to search Larsen's residence because he had information that Larsen had a gun

and was a robbery suspect. Larsen voiced no objection, and stated that he knew Lane had the right to search his property. (See Gov't Ex. 3, Rule 6) Larsen also stated that he didn't have a key to the apartment, as he had left it with the person who was driving his car and had dropped him (Larsen) off. Lane obtained a key from the motel manager and Lane, Larsen and the two detectives entered the apartment.

The group first entered the living area, and Lane again explained to Larsen that he was looking for a gun. Larsen said something to the effect that "You're probably thinking of this," and picked up a plastic pellet gun from a nearby stand. He said it was the only weapon he had or that an observer might construe as being a weapon. Detective Kretschman took the plastic gun to Larsen's neighbor, Mr.

Jacobson, who stated that it was definitely not the same gun he had previously seen in defendant's possession. Kretschman relayed that information to Lane, who then continued to search the living area, and subsequently the kitchen and bedroom.

During the search of Larsen's bedroom, Lane lifted a mattress and found a loaded .38 caliber revolver and a package of cartridges. Lane gave the gun to Kretschman, who unloaded it and took it to Jacobson. Jacobson stated that it too was definitely not the weapon he had previously observed. Kretschman so informed Lane. Lane did not believe that the gun he discovered (a revolver) was the one for which they were searching, an automatic weapon. Larsen was thereupon taken into custody upon Lane's request for violation of parole rules, and the

apartment search was terminated shortly thereafter.

Agent Lane conducted the entire search of Larsen's apartment. Neither Detective Kretschman nor Hughes assisted in the search. The detectives were present for Lane's protection, and to take Larsen into custody in the event a weapon was found.

Dane County Deputy Norbert Peter Endres arrived on the scene while the apartment search was in progress. He had no knowledge of the circumstances giving rise to the search, but was in the vicinity and had decided to see if the detectives needed assistance.[4] Upon arrival he observed Detective Kretschman discussing the plastic pellet gun with Mr. Jacobson. As Kretschman returned to

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[4] Deputy Endres' report is Defendant's Exhibit 4.

Larsen's apartment, he told Endres that he should be looking for an Olds Cutlass and set him back to Jacobson's apartment to get a better description of the vehicle. Jacobson told Endres that Larsen's car was an Oldsmobile Cutlass Supreme, gold with a brown top, license AHE 511. Shortly thereafter, Mr. Jacobson observed Larsen's car on Highway 18/151 heading east past the motel. Jacobson informed Endres and Kretschman, who, in turn, told Agent Lane. At this time, the .38 caliber revolver had already been discovered and Larsen had been taken into custody for violation of parole rules. Lane requested that Larsen's car be stopped so that it could be searched, and either Kretschman or Hughes told Endres to stop Larsen's car. Endres was not advised to arrest the operator, nor was he informed of the reason for the stop or the circumstances

surrounding it. Endres was aware that a question of a weapon was involved, however. He radioed a Verona police officer for assistance and advised the officer that there was uncertainty whether the driver was armed. The identify of the driver of Larsen's vehicle was unknown to any of the officers at this time.

Endres got into his marked squad car and headed east on Highway 18/151. After traveling a relatively short distance, he observed a gold Cutlass with a brown top. He activated his red and blue warning lights and siren and the Cutlass began to pull over. Instead of stopping on the side of the road, however, the driver turned into the parking lot of the Chalet Gardens Apartment and parked in one of the stalls directly in front of one of the apartments. Endres pulled in two feet behind, and perpendicular to, the Cutlass

(bearing Wisconsin license number AHE 511) effectively blocking its path.

In the course of making the stop, Deputy Endres contacted Detectives Hughes and Kretschman, who were still at the Colonial Motel with Agent Lane and Wade Larsen. Endres gave the detectives his location and asked for instructions. Hughes told Endres to get the driver out of the Cutlass as soon as possible and into Endres' vehicle. Endres was also told to detain the driver until the detectives could speak to him.

Agent Lane then proceeded to the Chalet Gardens Apartments (about seven miles from Larsen's apartment) in his own car. Detective Hughes followed in the unmarked vehicle, with Kretschman and Larsen (who was handcuffed) in the back seat.

Upon stopping, the driver of the

Cutlass voluntarily exited the vehicle without any instructions from Deputy Endres. Endres had already left his squad car. Endres watched the driver carefully, not knowing what danger he faced. The driver, later identified as the defendant, exited the car in the usual manner--stooped over with his back to Endres, then slowly turning and standing upright to face Endres. Endres told the defendant to come to him, and the two met near the trunk of the Cutlass where Endres performed a pat-down search for weapons. Finding none, he placed defendant in the back of the squad car. The defendant was not handcuffed. Endres neither informed defendant of his rights nor advised him that he was under arrest. However, Endres would not have permitted defendant to leave. The only verbal exchange initiated by Endres occurred when Endres asked what

defendant was doing at the Chalet Garden Apartments, and defendant replied that he was visiting a friend.[5]

Defendant waited in the squad car for approximately ten-twenty minutes when Agent Lane, Detectives Kretschman and Hughes, and Wade Larsen arrived.

Lane obtained the keys and searched (without success) the interior of the Cutlass for the still-missing automatic weapon. Lane then proceeded to search the trunk. There he observed two shoe box-sized cartons large enough to hold a

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[5] Mr. Pagel, on the other hand

> kept on asking me questions about why he was stopped and what was happening with WADE LARSON [sic] and I told him, honestly that I did not know what exactly was going on. I told him all I know is that I was asked to look for this vehicle and to hold the driver until our detectives arrived on the scene.

Defendant's Exhibit 4, p. 3.

handgun. He lifted the covers off the cartons and saw that they contained what appeared to be drug paraphernalia. He then motioned to Detectives Kretschman and Hughes to come to the trunk area and asked them what to do. They advised that the car be seized and a search warrant for the trunk be obtained.[6] Lane then completed his search of the trunk for the automatic weapon but did not find it. Larsen observed the search from the detectives' car parked fifteen to twenty feet away. He made no comment when Lane began to search his car.

At some point during the search, a woman standing on a second floor balcony about thirty feet from the Cutlass directed the officers' attention to a small, white package under a car parked

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[6] That this course was followed is not contested.

next to, and three to four feet from, the Cutlass.[7] Agent Lane picked up the package and handed it to Kretschman, who inspected the contents and determined it to be cocaine. Kretschman then walked over to Endres' squad car and instructed that defendant be placed under arrest for possession of cocaine. Detective Kretschman recognized defendant from prior dealings, but did not know the identify of the person being detained by Endres until he (Kretschman) approached the car and ordered defendant placed under arrest.

From the time Office Endres told defendant to remain in the squad car, defendant was not at liberty to leave the car or the site of the stop, and a reasonable person in defendant's position

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[7] Deputy Endres' report says the package was under the front wheel of the Cutlass, but both Agent Lane and Detective Kretschman testified that it was under an adjacent vehicle.

would have believed himself to be in custody. He remaining in custody throughout the search of the Cutlass up to, and including, the point at which he was formally placed under arrest.

CONCLUSIONS OF LAW

Defendant's motions present two discrete questions--the alleged illegality, on various grounds, of the search of the vehicle, and the alleged illegality of defendant's detention following the stop. I will consider these questions separately.

1. The Search of Larsen's Vehicle

It is undisputed that the search was conducted by state officers and its legal sufficiency must be measured by state rules within the framework of federal constitutional standards. More specifically the search was conducted by a

state parole officer,[8] without a warrant, under the authority of the regulations adopted by the Wisconsin Department of Health and Social Services with regard to the supervision of persons on parole.

Defendant first contends that the regulation is unconstitutional to the extent that it permits a search without a warrant and on less that probable cause. Such a search, defendant urges, is unreasonable under the Fourth Amendment.

The search of Larsen's apartment (the validity of which is not in issue) and of his car was conducted pursuant to HSS §328.21, which provides, in pertinent part:

> **Search and seizure.** (1) GENERAL POLICY. A search of a client or

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[8] There is simply no factual support for defendant's argument that the police used Larsen's parole status as a pretext to conduct their own search. It is clear that Agent Lane initiated and conducted the search of the apartment and the car.

the client's living quarters or property may be made at any time, but only in accordance with this section.

* * *

(3) SEARCH OF LIVING QUARTERS OR PROPERTY.
(a) A search of a client's living quarters or property may be conducted by field staff if there are reasonable grounds to believe that the quarters or property contain contraband. Approval of the supervisor shall be obtained unless exigent circumstances, such as suspicion the parolee will destroy contraband or use a weapon, require search without approval.[9]

* * *

(6) **CONTRABAND.** In deciding whether there are reasonable grounds to believe that a client possesses contraband or that a client's living quarters or property contain contraband, a staff member shall consider:

(a) The observations of staff members;

(b) Information provided by

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[9] No prior approval is required for the search of a parolee's person. HSS §328.21(2).

informants;

(c) The reliability of the information relied on. In evaluating reliability, attention shall be given to whether the information is detailed and consistent and whether it is corroborated;

(d) The reliability of the informant. In evaluating reliability, attention shall be given to whether the informant has supplied reliable information in the past and whether the informant has reason to supply inaccurate information;

(e) The activity of the client that relates to whether the client might possess contraband;

(f) Information provided by the client that is relevant to whether the client possesses contraband;

(g) The experience of a staff member with that client or in a similar circumstance;

(h) Prior seizures of contraband from the client; and

(i) The need to verify compliance with rules of supervision and state and federal law. (emphasis added)

Manifestly, the regulation not only

authorizes the search of a parolee's residence or property without a warrant, but also permits the unwarranted search to be made on less than probable cause; i.e. "reasonable grounds" to believe that contraband is to be found.

The constitutional challenge may now be settled with dispatch. As defendant had himself noted, Wisconsin only recently rejected a virtually identical attack in State v. Griffin, 131 Wis.2d 41, 388 NW2d 535 (1986) which involved the warrantless search of a probationer's residence under the regulation in issue here. Subsequent to the evidentiary hearing, on June 26, 1987, the United States Supreme Court upheld that decision, concluding that:

> The search of Griffin's residence was "reasonable" within the meaning of the Fourth Amendment because it was conducted pursuant to a valid regulation governing probations.

Griffin v. Wisconsin, ___ US ___, No. 86-

5324, slip op. at 15 (June 26, 1987). That decision is controlling here.

The suggestion that defendant's posture is somehow improved by the fact that he is a third party in possession of the object of the search is flawed. As the Wisconsin supreme Court noted in rejecting the same contention, the rights of defendant, or any other third parties, would not be considered by an impartial magistrate in determining whether or not a warrant should issue for the search of the property. State v. Griffin, 131 Wis.2d at 57. It is not apparent how the rights of a third party would be enhanced or otherwise affected by the fact that no warrant is required under the circumstances.[10] The object of the search

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[10] Defendant's reliance upon Steagald v. United States, 451 US 204 (1981) is misplaced. There the Supreme Court held that the existence of a warrant for the arrest of X did not justify the

was Larsen's car, not the defendant.[11] If the search of the car was lawful, whether under a warrant or under the regulation here, it would not be defeated by the fact that defendant happened to be in it or driving it at the time of the execution of the search.

It was, of course, necessary to stop the car in order to effect the search, the lawfulness of the one being dependent upon the lawfulness of the other. But the stop itself did not, in any event, infringe any

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warrantless search of Y's dwelling to effect the arrest.

[11] Indeed, defendant's identity was neither known nor relevant to Lane's decision to search the car. Defendant's presence in it neither adds to, nor detracts from the existence of grounds to believe the weapon was in the car. While defendant may have had a privacy interest sufficient to establish standing to object to the search of the car, that interest alone does not preclude the admissibility of evidence against him if the officers had a lawful right to conduct the search. See United States v. Lisk, 559 F.2d 1108, 1111 (7th Cir. 1977).

privacy interest of the defendant, though it undoubtedly interfered with his transportation and his convenience.[12]

Defendant also contends that there was no sufficient factual basis for the search of the car. What constitutes "reasonable grounds" is not defined in the regulations. However, in Griffin the Wisconsin courts found reasonable grounds to exist in the report of an unidentified police officer "that there were ... or maybe there were guns in the probationer's apartment." State v. Griffin, 131 Wis. at 62. The Supreme Court held that this somewhat speculative and unauthenticated tip, while inadequate to establish probable cause, was adequate to support the search, given the special needs and circumstances of the agent's supervisory

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[12] As discussed below, the subsequent detention of the defendant presents a separate question.

responsibilities. Griffin v. Wisconsin, Slip. op. at 13-14.

Against this backdrop, the existence of reasonable grounds (if not, indeed, probable cause) to believe that Larsen had an automatic weapon in his house or car can hardly be disputed. Two citizen witnesses-Jacobson and the motel manager-provided their firsthand experience and observations with regard to Larsen's possession of at least one handgun. The manager and others in the motel had heard gunfire and Larsen had admitted he fired a gun. Jacobson saw Larsen entering his car with the automatic and reaffirmed his positive identification more than once. Everything that would have been required for the issuance of a warrant for the search of defendant's apartment and car under Illinois v. Gates, 462 US 213 (1983) was present here.

The grounds for the search of the car are even stronger when the question is viewed as of the time the search of the apartment was completed. Larsen's suspicious behavior outside the motel, his attempted deception with the plastic gun, his lie about the presence of any weapon, and the discovery of the revolver could all be reasonably seen as reinforcing the belief as to the existence of the automatic weapon. As it could not be found on Larsen's person or in his apartment, the car, by a process of exclusion, became an even more likely repository. In these circumstances, a warrantless search of the car would have been justified under conventional Fourth Amendment jurisprudence. See United States v. Ross 456 US 798, 804-09 (1982)[13]. Plainly the

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[13] The Supreme Court has long recognized the impracticability of securing a warrant in cases involving the

Griffin standard "that there were or might be guns" was met. Griffin v. Wisconsin, slip op. at p. 6.

This also answers defendant's contention that Lane had not received specific approval from his supervisor to search the car. While the testimony in this regard is somewhat confused, it must be noted that supervisory approval is not required in all cases.[14] HSS§328.21(3)

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transportation of contraband goods. Given the nature of the automobile in transit, an immediate intrusion is necessary in order to secure illicit cargo "because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." Ross, 456 US at 806, quoting Carroll v. United States, 267 US 132, 153 (1925). The same considerations are present here.

[14] While the precise dimensions of his request to search are somewhat unclear, it is clear that he did not specifically seek approval to search the car. Agent Lane testified once that he asked approval to search the residence. (Tr. 32) Later he stated that he just asked approval to search. (Tr. 33) Still later he said he asked approval to search Larsen's property. (Tr. 53) That his

expressly authorizes an agent to conduct a search without approval in exigent circumstances. Even if such approval was not granted, I find that exigent circumstances existed at the conclusion of the apartment search for the unapproved search of the car.

The courts have long excused the failure to obtain a warrant when there was insufficient time to do so and a substantial risk inter alia of the loss or destruction of evidence was presented. See Llaguno v. Mingey, 763 F.2d 1560 (7th Cir. 1985) (Entry of third party's dwelling without warrant). Indeed, the so-called automobile exception, as

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request was granted is not disputed, and it is obvious that he understood it to extend to the search of the car. Since the object of the search was the handgun, and since the supervisor was informed about the circumstances under which the gun had been seen, it is not unlikely that she intended also to authorize a search of Larsen's property--his car.

expressed in United States v. Ross, supra, may be viewed simply as a particularized application of the exigency exception.

Defendant also claims that there is no evidence (1) that Agent Lane performed the "reasonable grounds" analysis required by HSS § 328.21(3) and (6) before seeking authorization to perform the search; (2) that he relayed the information he obtained from Detective Kretschman to his supervisory, Christine Flood; and (3) that Flood performed a "reasonable grounds" analysis under 328.21(3) and (6). It is evident that defendant would impose upon the parole/probation staff conditions even more taxing that are required to obtain a warrant. As is obvious from the dissents of Justice Bablitch (State v. Griffin, 131 Wis.2d at 67-68) and justice Blackmun (Griffin v. Wisconsin, slip op. at 29-30) similar arguments were presented to, and

rejected by, the majorities in both courts. It is not difficult to understand why. Defendant's contentions, if accepted, would convert the regulatory scheme for parolee searches into quasi-judicial proceedings, wherein parole agents would be required to file search warrant "complaints" with supervisors, who in turn would issue "warrants". Nothing in the regulation or either of the Griffin decisions supports that construction. The enumeration in HSS §328.21(b) simply identifies elements for consideration by the probation officer in deciding if a search should be made and by the supervisory in deciding to approve it. Griffin v. Wisconsin, slip op. p. 13-14, and n. 6. Whether that determination was, in the final analysis, supported by reasonable grounds is, like probable cause, a questions of law for

determination by a court upon review. I have concluded that Lane did relay the information he had to his supervisor. I have also concluded that reasonable grounds did in fact exist for the search. It is irrelevant that the government did not establish the analytical procesesses by which the officers' determinations were made.

Defendant has raised various other, related arguments in support of his position. I have considered them and find them to be without merit. It will be recommended that the motion to suppress the fruits of the search of Larsen's car be denied.

2. Defendant's Statement To Deputy Endres

Defendant seeks to suppress his statement to Deputy Endres on the grounds that he was taken into custody and

interrogated without probable cause to believe he had committed, or was committing, a crime and without receiving the warnings prescribed by Miranda v. Arizona, 384 US 436 (1968). I concur in that assessment.

A person is taken into custody, or "seized", within the meaning of the Fourth Amendment if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave. United States v. Mendenhall, 446 U.S. 544, 544-45 (1980); United States v. Borys, 766 F.2d at 304, 308-09 (7th Cir. 1985). The facts show that after defendant exited Larsen's car, Deputy Endres told defendant to come back to him. Defendant was then pat-searched for weapons,[15] and placed in the rear of

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[15] The lawfulness of the pat-search is not in issue.

Endres' squad car. It is undisputed that Deputy Endres was under explicit orders to hold defendant until Detectives Kretschman and Hughes arrived. Indeed, Endres testified on cross-examination that defendant was not free to leave prior to the detectives' arrival. Moreover, Endres' report of the incident indicates that defendant's status was custodial, and that an interrogation occurred:

> While Mr. Pagel was <u>in my custody</u> I asked him absolutely no questions except for the fact of why he was there. Mr. Pagel kept on asking me questions about why he was stopped and what was happening with Wade Larson [sic] and I told him honestly that I did not know what exactly was going on (Def. Ex. 4, p. 3) (emphasis added)

It seems to me that a reasonable person, having been pat-searched and placed in the back seat of a squad car by a uniformed deputy, without explanation, would not believe he was free to leave. I conclude

that defendant was subjected to custodial interrogation within the meaning of Miranda, and that his statement must be suppressed for Endres' failure to apprise defendant of his constitutional rights.

I also conclude that defendant was arrested without probable cause, and that his statement must also be suppressed as a fruit of that illegality. It is uncontroverted that none of the police officers involved in the stop of Larsen's car knew the identity of the driver. They had no information that that person had committed, or was about to commit, any crime. In fact, in his report, Endres stated that he could not tell defendant why he was being held because Endres "did not know what exactly was going on." (Def. Ex. 4, p. 3) As far as Endres and the other officers were aware, defendant was nothing more than an innocent

bystander who happened to be in possession of property that they were authorized to search. Once the pat-search of defendant was completed, and no weapon found, the officers had no conceivable reason, let alone probable cause, to hold defendant.

The government urges that defendant was not arrested but was merely "detained" pursuant to a "Terry-type stop", so named after the Supreme Court's decision in Terry v. Ohio, 392 US 1 (1968). There, the Supreme Court upheld a pat-search of a person for concealed weapons (sometimes referred to as an "investigative detention") on less than probable cause, specifically, "a reasonable articulable suspicion." 392 US at 21, 20. Since the vehicle was lawfully stopped to effect the search, I am not persuaded, in the first instance, that the facts of this case fall

within Terry's conception of an investigative detention. Cf. Berkemer v. McCarty, 468 US 420, 439-40 (1984). However, I need not dwell on the issue as it is clear in any event that the officers never had a reasonable articulable suspicion that defendant was engaged in any criminal activity. As I have already indicated, the officers had no reason whatever to suspect defendant of anything. See United States v. Denney, 771 F.2d 318, 321 9th Cir. 1985) (Due weight must be given, not to the officer's inchoate and unparticularized suspicion or "hunch", but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience as a police officer.)

Based on the foregoing, it will be recommended that defendant's statement be

suppressed.[16]

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED, pursuant to 28 USC 636(b)(1)(B), that defendant's Motion to Suppress--Contents of Oldsmobile be **DENIED**; and

IT IS FURTHER RECOMMENDED that defendant's Motion To Suppress--Statements be **GRANTED.**

ENTERED this 1 day of July, 1987.

/s/ James Groh
JAMES GROH
United States Magistrate

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[16] Defendant also seeks suppression of his identification as a fruit of the unlawful arrest. However, Deputy Endres identified defendant at the time Larsen's vehicle was stopped. I have already determined that the stop of Larsen's vehicle was not unlawful, as a necessary predicate to the search. Consequently, Endres' identification was not the product of any illegality and is admissible under the "independent source" doctrine. See 3 W. LaFave Search and Seizure §11.4, p. 617 (1978).